

I must consider now anew the sentence which was imposed by me on Thomas J. Pendergast, to know to what extent it should guide me as a precedent in the case of Emmet O'Malley, who has pleaded guilty to a similar offense. Due consideration for the criticism that sentence has received from good men requires its re-examination.

#### Pendergast Sentence Exactly in Line

1. When I imposed that sentence I knew that it was exactly in line with sentences I had imposed in criminal cases in which there were pleas of guilty, during the fourteen years I have served as a Federal Judge. If it was out of line in any way whatever, it was out of line on the side of severity, not leniency.

There has been some public reference to the sentences imposed by me in the vote fraud cases, where there were pleas of guilty or nolo contendere. I have reviewed the sentences in those cases. Eighteen vote fraud cases fell to me.

There were in those cases 16 pleas of guilty. There was 1 sentence of a year and a day in the penitentiary, 11 jail sentences ranging from one month to seven months, and 4 probations. Eighty-one entered pleas of nolo contendere. Not one of them was required to serve a day in jail. These were offenses for which the maximum possible imprisonment was ten years, just twice that authorized for attempted tax evasion.

There has been some public reference to the sentences I have imposed in Dyer Act cases. There the maximum punishment possible is five years' imprisonment. I have sentenced scores, perhaps hundreds, of these offenders. When there is a plea of guilty and no record of criminal convictions, my sentence almost invariably has been imprisonment for one and one-half years or less.

The sentences I have imposed in connection with every other type of crime might be studied. It would then be found that the Pendergast sentence was in line with all other sentences where there were pleas of guilty and no records of previous criminal convictions.

#### One of Heaviest Sentence Ever Imposed

2. I have reason to believe that the Pendergast sentence was one of the heaviest that ever has been imposed in United States in a case charging an attempt to evade an income tax in which there was a plea of guilty.

#### Pendergast Sentence Analyzed

3. Some who have criticized the Pendergast sentence have not carefully studied it. The first part of the sentence was imprisonment in the penitentiary for one year and three months. The second part of the sentence was a fine of \$10,000, above and beyond all civil penalties. The third part of the sentence was three years' imprisonment in the penitentiary (additional to the one year and three months), with probation for five years.

The thinking man will know that while a penitentiary sentence, no part of which is to

be served unless probation is revoked, is little more than a stern warning, a suspended penitentiary sentence of three years, with probation for five years, following a penitentiary sentence of a year and three months which actually must be served in a felon's cell, is much more than twice a sentence of one year and three months, all to be served. Why is that true? Because the first year (indeed the first week) in the penitentiary more than offsets any succeeding two years or five years. It is in the first year, the first week, the first day after the iron gates have clanged shut, that the badge of "Convict" is fastened upon the prisoner. When the prisoner steps out of actual confinement and begins to serve, during five additional years, a suspended penitentiary sentence, he is still a "Convict." Pendergast was sentenced to wear the badge of "Convict" for one year and three months behind penitentiary walls, in the seclusion of a prison, and then to wear it for five years longer before the eyes of his fellow men.

And there are those who really think that such a sentence, imposed on an old, and a sick man, in all probability a sentence to actual punishment for the remainder of his life, was not severe enough for the crime of attempting to evade the payment of a tax, attempting to evade the payment of a debt. He should have been broken upon the wheel! At the very least he should have been sentenced to what for him necessarily would have been life imprisonment. Well, perhaps I am altogether wrong, but I do not agree with these good men.

#### The Capone Sentence

4. There are those who speak of the Capone case Is it possible that an intelligent man will compare that with the Pendergast case? Capone had a criminal record. Capone did not plead guilty. Capone fought the Government through trial court, Court of Appeals, and the Supreme Court. With all of that, his sentence was three years on each of three counts and he was required to pay one \$10,000 fine. Reducing that sentence by eliminating one period of three years to make the case parallel with the case of Pendergast, in which there were only two counts, the sentence was six years plus a \$10,000 fine. Pendergast plead guilty. He was not a former convict. He was an old and sick. He has been dealt swift punishment, not punishment long delayed.

#### Considering Principles

5. At least ten days before the Pendergast plea was entered it was intimated to me and to the United States Attorney that it would be entered. For ten days I gave the most careful and painstaking thought to what principles should determine the sentence, reserving final determination of the sentence until I had heard statements in open court from both sides. I stated what those principles were at the time of sentence. I shall not repeat that statement now.

I gave especially careful consideration to the nature of the offense charged. The

attempt to evade the payment of a tax is not a crime malum in se, as is murder, rape, and theft. It is a crime malum prohibitum. Ordinarily the only penalty for the offense is a civil penalty. In 99 out of 100 cases where it is established beyond any doubt that citizen has attempted to evade the full payment of his income tax, the Government has accepted the tax plus the civil penalty. And that is as it should be. But the Government of the United States does not compromise for money what is truly and inherently a crime.

Apparently there was one of the applicable principles upon which I did not sufficiently enlarge on Monday. I said then that if one is charged with attempting to evade a tax and pleads guilty to that charge he should not be punished for a score of other crimes with which he is not charged, as to which the law conclusively presumes his innocence. I thought the principle so obviously was sound that it needed no enlargement.

Certainly it is within the discretion of the judge to make the sentence small or great in accordance with the mitigating or aggravating circumstances of the crime. But the circumstances which may affect the sentence must be circumstances connected with the crime. For example, if an attempt to evade a tax succeeds previous attempts, admitted or proved, or other previous crimes, admitted or proved, that is an aggravating circumstance that should affect the punishment. Again, if the attempt to evade the tax involves substantial amounts, that is an aggravating circumstance which should affect the punishment. But it is absurd to say that the source from which a citizen receives income, however bad, or the purpose for which he receives it, however evil, is an aggravating circumstance of an attempt by him to avoid payment of an income tax. The two things have no connection whatsoever.

These principles seem to me now as they seemed on Monday to be true and sound. Perhaps I should have ignored them in the Pendergast case alone. Perhaps I should have ignored in that one case precedents and principles and the commands of reason. Perhaps I should have yielded to passion and hatred and revenge. I am glad I did not yield.

O'Malley

6. O'Malley, it appears, lived honorably for more than sixty years. He was honest in his transactions with his fellow men. Then he became an important officer of the state. In that capacity he settled with insurance companies a piece of litigation involving millions of dollars. He was bribed to make that settlement. For thirty thousand pieces of silver he betrayed Missouri. The tax he attempted to evade was on the bribe money he received. But he has not been charged with the taking of a bribe. He could not be charged with that offense in this Federal Court. He has plead guilty to the charge of attempting to evade the tax, in amounts which are substantial. The punishment will be substantial. He has not plead guilty to bribe taking. The simple question is, should he be

punished for the crime with which he is charged, and then punished, in the same judgment, for a crime which is not and could not be charged against him in this court, but which may and should be charged against him in another court? It is a simple question. The only answer possible is an emphatic, "No."